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KTPC Resort Development Bhd v Convobuilt Sdn Bhd

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HIGH COURT (SHAH ALAM) — SUIT NO 22NCVC-671–11 OF 2017
GUNALAN MUNIANDY J
23 NOVEMBER 2018

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Limitation — Breach of contract — Defendant counterclaimed for value of trust properties sold by plaintiff — Defendant counterclaimed for loss of furnishing materials — Whether defendant's counterclaim statute-barred — Limitation Act 1953 s 6(1)

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Trusts and Trustees — Trusts — Existence of — Plaintiff and defendant entered into settlement agreement to settle plaintiff's debt — Plaintiff assigned apartment units to defendant purportedly as consideration for defendant to pay redemption sum to chargee bank — Whether apartments were held in trust by defendant for plaintiff — Whether there was constructive trust

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The plaintiff was the developer of the project known as Kulim Golf & Country Resort and Kulim Heights Apartment ('the said apartment') whereas the defendant was the plaintiff's contractor for the said project. The plaintiff was indebted to the defendant and this led the parties to enter into a settlement agreement ('the SA') to settle the outstanding sum amounting to RM7.75m.

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The plaintiff's case was that the parties had agreed in the SA that 34 apartment units of the said apartment were to be part settlement of the debt and 24 apartment units were intended to be consideration for the redemption sum payable to Affin Bank Bhd ('the chargee bank'). The plaintiff was notified by the chargee bank that no redemption fee was required, as such, the plaintiff

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asked for the 24 apartment units to be held in trust to be reassigned back to the plaintiff. The defendant had refused to reassign and/or cancel the assignment of the 24 apartment units. Consequently, the plaintiff filed the present action and claimed for an order to compel the defendant to reassign the 24 apartment units back to the plaintiff without encumbrances and to settle all outstanding

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maintenance charges, taxes, assessment, quit rent and insurance. In its defence, the defendant relied on the evidence of DW1. The defendant contended that from an objective construction of the SA, the intention of the parties was to transfer and convey the 58 properties to the defendant without the creation of a trust, whether express or a purpose trust. The defendant counterclaimed for

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a declaration that the 24 apartment units were trust properties held by the plaintiff for the benefit of the defendant and for the plaintiff to take all steps to effect transfer of the 24 apartment units to the defendant. The issues in the present case was: (a) whether the said 24 apartment units assigned by the plaintiff to the defendant under the SA were held by the defendant in trust for

the plaintiff; (b) whether the plaintiff's purported sale of three properties which were the subject of the SA was a fraudulent breach of trust.

Held, dismissing the plaintiff's claim and allowing the defendant's counterclaim in part with costs of RM30,000:

(1) In respect of constructive trust, the law was that it would only be imposed by the court to satisfy the demands of justice. It was plain that the facts of the present case did not fall within the scope of a constructive trust. In particular, the plaintiff had not demonstrated that justice and good conscience required that an inference be made of the existence of such a trust in favour of the plaintiff (see paras 44–45).

(2) The plaintiff who was alleging the existence of trust bore the onus of proving the existence of the purported trust. The plaintiff had failed to prove satisfactorily that the 24 apartment units were assigned to the defendant to be held in trust for the plaintiff for the properties to be reverted to the plaintiff should the defendant fail to settle the redemption sum to the chargee bank. There was no provision or agreement to this effect in the SA. Having construed the SA literally, the court held that the remedy for the failure of the defendant to pay the redemption sum was not reversion or reassignment of the units to the plaintiff. The plaintiff had failed to prove on a balance of probabilities its pleaded claim premised on trust (see paras 49, 59 & 61).

(3) On the claim for the three trust properties, DW1 admitted that the defendant had received payment on 13 February 2007, hence, the cause of action accrued on the said date after which the limitation started to run. As such, this claim, being premised on contract, was statute-barred as it was commenced only in 2017 which was well after the limitation period had lapsed. In regard to the claim for loss of furnishing materials, DW1 admitted that the purchase of the same was done in 2010 whereas the counterclaim was only filed on 3 January 2018. Under the circumstances, the defendant's cause of action for these reliefs accrued in the year 2010 and as such, it was caught by s 6 of the Limitation Act 1953 (see paras 64, 66 & 68).

(4) The defendant had proved its entitlement to the loss of income as pleaded for a period of six years preceding the commencement filing of the present action at the monthly rental rate stated which was supported by the evidence of DW1 (see para 69).

[Bahasa Malaysia summary

Plaintif adalah pemaju projek yang dikenali sebagai Kulim Golf & Country Resort dan Kulim Heights Apartment ('apartmen tersebut') manakala defendan adalah kontraktor plaintif untuk projek tersebut. Plaintif telah berhutang kepada defendan dan ini menyebabkan pihak-pihak memasuki

perjanjian penyelesaian ('SA') untuk menyelesaikan jumlah yang tertunggak berjumlah RM7.75 juta. Kes plaintif adalah bahawa pihak-pihak telah bersetuju di dalam SA bahawa 34 unit apartmen tersebut adalah sebahagian daripada penyelesaian hutang dan 24 unit apartmen dimaksudkan untuk dipertimbangkan untuk jumlah penebusan yang perlu dibayar kepada Affin Bank Bhd ('bank pemegang gadaian'). Plaintif telah dimaklumkan oleh bank pemegang gadaian bahawa tiada bayaran penebusan diperlukan, oleh itu, plaintif meminta 24 unit apartmen yang dipegang sebagai amanah untuk dipindahkan semula kepada plaintif. Defendan menolak untuk memindahkan semula dan/atau membatalkan pemindahan 24 unit apartmen. Akibatnya, plaintif memfailkan tindakan ini dan menuntut perintah untuk memaksa defendan untuk memindahkan 24 unit apartmen semula kepada plaintif tanpa bebanan dan untuk menyelesaikan semua caj penyelenggaraan, cukai, cukai taksiran, cukai pintu dan insurans yang tertunggak. Dalam pembelaannya, defendan bergantung pada keterangan DW1. Defendan berpendapat bahawa daripada tafsiran objektif SA, niat pihak-pihak adalah untuk memindahkan dan menyampaikan 58 harta kepada defendan tanpa membentuk amanah, sama ada nyata atau amanah bertujuan. Defendan menuntut balas untuk pengisytiharan bahawa 24 unit apartmen adalah harta amanah yang dipegang oleh plaintif untuk kepentingan defendan dan untuk plaintif mengambil segala langkah untuk melaksanakan pemindahan 24 unit apartmen kepada defendan. Isu-isu dalam kes ini adalah: (a) sama ada 24 unit apartmen yang dipindahkan oleh plaintif kepada defendan di bawah SA dipegang oleh defendan sebagai amanah kepada plaintif; (b) sama ada penjualan plaintif yang dikatakan tiga harta yang menjadi subjek SA adalah pecah amanah palsu.

Diputuskan, menolak tuntutan plaintif dan membenarkan sebahagian tuntutan balas defendan dengan kos RM30,000:

(1) Berkenaan dengan amanah konstruktif, undang-undang adalah hanya akan dikenakan oleh mahkamah untuk memenuhi tuntutan keadilan. Adalah jelas bahawa fakta-fakta kes ini tidak termasuk dalam skop amanah konstruktif. Khususnya, plaintif tidak menunjukkan bahawa keadilan dan hati nurani yang baik menghendaki kesimpulan dibuat dari kewujudan amanah yang memihak kepada plaintif (lihat perenggan 44–45).

(2) Plaintif yang mendakwa kewujudan amanah menanggung beban membuktikan kewujudan amanah yang dikatakan. Plaintif gagal membuktikan dengan memuaskan bahawa 24 unit apartmen telah dipindahkan kepada defendan untuk dipegang sebagai amanah bagi plaintif bagi harta yang akan dipulangkan kepada plaintif sekiranya defendan gagal menjelaskan jumlah penebusan tersebut kepada bank pemegang gadaian. Tiada peruntukan atau perjanjian untuk kesan ini dalam SA. Setelah mendefinisikan SA secara harfiah, mahkamah berpendapat bahawa remedi kegagalan defendan untuk membayar

jumlah penebusan tersebut bukanlah pembalikan atau pemindahan semula unit kepada plaintif. Plaintif telah gagal untuk membuktikan ke atas imbangan kebarangkalian tuntutan yang dikemukakan berdasarkan amanah (lihat perenggan 49, 59 & 61).

(3) Berkenaan tuntutan ketiga-tiga harta amanah tersebut, DW1 mengakui bahawa defendan telah menerima pembayaran pada 13 Februari 2007, oleh itu, kausa tindakan yang terakru pada tarikh tersebut yang mana had masa bermula. Oleh itu, tuntutan ini, yang dimulakan berdasarkan kontrak, adalah undang-undang yang dilarang kerana ia hanya dimulakan pada tahun 2017 yang mana selepas tempoh had masa luput. Berkenaan dengan tuntutan kehilangan material bekalan, DW1 mengakui bahawa pembelian yang sama telah dilakukan pada tahun 2010 sedangkan tuntutan balas itu hanya difailkan pada 3 Januari 2018. Di bawah keadaan ini, kaus tindakan defendan untuk relif ini terakru pada tahun 2010 dan oleh itu, ia ditangkap oleh s 6 dari Akta Had Masa 1953 (lihat perenggan 64, 66 & 68).

(4) Defendan telah membuktikan haknya untuk kehilangan pendapatan sebagaimana yang dipohon selama enam tahun sebelum pemfailan permulaan tindakan ini pada kadar sewa bulanan dinyatakan yang disokong oleh keterangan DW1 (lihat perenggan 69).]

Notes

For cases on breach of contract, see 9 *Mallal's Digest* (5th Ed, 2018 Reissue) para 2428.

For cases on existence of, see 12(2) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 3583–3598.

Cases referred to

Board of Trade v Cayzer, Irvine & Co [1927] AC 610, HL (refd)
Heng Grek Kian v Goh Koon Suan [2007] 6 CLJ 626, CA (refd)
Hock Hua Bank Bhd v Leong Yew Chin [1987] 1 MLJ 230, SC (refd)
Nasri v Mesah [1971] 1 MLJ 32; [1970] LNS 85, FC (folld)
Read v Brown (1888) 22 QBD 128, CA (refd)
Reeves v Butcher [1891] 2 QB 509, CA (refd)
Takako Sakao (f) v Ng Pek Yuen (f) & Anor [2009] 6 MLJ 751; [2010] 1 CLJ 381, FC (refd)
Tay Choo Foo @ Tay Chiew Foo v Tengku Mohd Saad @ Tengku Arifaad bin Tengku Mansur & Ors (all acting as administrators of the estate of Tunku Mansur bin Tunku Yaacob, deceased) and another appeal [2009] 1 MLJ 289, CA (distd)

Legislation referred to

Limitation Act 1953 s 6

Sivabalan S (Goh Wan Ping with him) (Mastura Partnership) for the plaintiff. Josyne Delano Goonting (Lum May Lan with him) (ML Lum & Co) for the first defendant.

Gunalan Muniandy J:

[1] This action arises out of a settlement agreement ('S/A') entered into between the plaintiff ('KTPC'), a public company and the defendant ('Convobuilt') a private limited company. The purpose of the S/A was to resolve the issue of the plaintiff's indebtedness to the defendant in the sum of about RM7.75m for works undertaken by the latter as a contractor engaged by the plaintiff.

FACTUAL BACKGROUND OF THE PLAINTIFF'S CASE

[2] The plaintiff is a public company with its registered address at Persiaran Kulim Golf, Kulim Golf & Country Resort (KGCR), Kulim Hi-Tech Park, 09000 Kulim, Kedah Darul Aman. The defendant is a private limited company incorporated in Malaysia with a business and service address at 1303, 13th Floor PJ Tower, Amcorp Trade Centre, 18 Jalan Persiaran Barat, 46200 Petaling Jaya, Selangor Darul Ehsan.

[3] The plaintiff is the developer of the project known as Kulim Golf & Country Resort ('KGCR') within the Kulim Hi-Tech Park and including the development of an apartment building known as Kulim Heights Apartments and a 27 Hole Golf Resort.

[4] At the material times, the plaintiff was the owner of 118 apartment units of the said Kulim Heights Apartments erected on land held under HS (D)69894, No PT 10886, Bandar Kulim, Daerah Kulim, Negeri Kedah.

[5] The 118 apartment units of the said Kulim Heights Apartments at all material times were charged to Affin Bank Bhd as security for loan granted to the plaintiff and the redemption amount pegged and/or fixed by Affin Bank Bhd for each unit being RM75,000.

[6] The plaintiff was indebted to the defendant for the sum of RM7,758,150.56 for works undertaken in its capacity as contractor in KGCR and parties agreed to the settlement amount being RM7,751,930.56 and on that basis, the plaintiff and defendant entered into a settlement agreement on 15 April 2004.

[7] The plaintiff had agreed to assign a total of 34 apartment units at the said Kulim Heights Apartments to the defendant as part of the said agreement by way of contra and in lieu of cash payment amounting to RM5,236,590 ('the first arrangement'). A

[8] The plaintiff also transferred a total of 340 Kulim Golf and Country Resort memberships amounting to RM2,515,340.56 to the defendant ('the second arrangement'). B

[9] The plaintiff paid in cash a sum of RM6,220 ('the third arrangement'). C

[10] In respect of the first arrangement, the plaintiff was cash strapped and as such agreed to assign a total of 24 apartments units of the said Kulim Heights Apartments to the defendant in lieu of cash for the defendant to make payment to the Affin Bank Bhd to redeem the 34 apartment units from Affin Bank Bhd. D

[11] The assignment of the said 24 apartment units to the defendant was purely to effect the redemption of the 34 apartment units.

[12] The plaintiff proceeded to assign a total of 58 apartment units to the defendant. However, the plaintiff retained and held back the keys to 24 apartment units on the specific understanding that the keys to the 24 apartment units will be only handed over once the defendant had paid the redemption amount totalling RM2,550,000 on behalf of the plaintiff to Affin Bank Bhd and had redeemed all 58 Apartments Unit from Affin Bank Bhd. E F

[13] The plaintiff agreed that in the event the redemption amount were to increase (which was pegged at RM75,000 per unit), then the plaintiff will arrange for *top up* of the differential amount. G

[14] The plaintiff was notified by Affin Bank Bhd that no redemption fee amounting to RM75,000 per unit was required. The plaintiff notified the defendant and asked for the 24 apartment units to be held in trust to be reassigned back to the plaintiff. H

[15] The defendant to date refuses to reassign and or cancel the assignment of the 24 apartment units being held in trust.

[16] The plaintiff claims for an order to compel the defendant to reassign the 24 apartments units back to the plaintiff without encrumbrances and to settle all outstanding maintenance charges, taxes, assessment, quit rent and insurance. I

THE DEFENDANT'S DEFENCE AND COUNTERCLAIM

[17] The settlement agreement ('SA') on its true construction, is concerned and deals with all 58 properties without distinction and makes provision for the defendant's obligations in so far as effecting payment of the redemption sum of RM75,000 for each of the 58 properties in the aggregate amount of RM4,350,000 to Affin Bank Bhd.

[18] The SA is intended to be a collateral agreement to be read together with the 58 individual sale and purchase agreements ('SPAs') and is an essential and constituent part of the contract between the parties.

[19] The SA is silent as to any trusts in favour of the plaintiff and makes no provision for the creation of any express trust or purpose trust as contended by the plaintiff.

[20] The plaintiff has committed breach of contract as trustee; fraudulent breach of trust and trespass in respect of the 24 apartment units in failing and/or refusing to deliver possession of the 24 units to the defendant.

[21] By a joint venture agreement dated 11 December 1994 between Restu Harmoni Sdn Bhd and Kulim Technology Park Corp it was agreed to develop 182.36 hectares within the Kulim Hi-Tech Park into a 27 hole golf course, with club houses and bungalow lots through a joint venture vehicle in the form of the plaintiff. Subsequently, Restu Harmoni as a joint venture party with Kulim Technology Park Corp was substituted by Kemas Budi Sdn Bhd.

[22] The defendant counterclaims for a declaration that the 24 properties are trust properties held by the plaintiff for the benefit of the defendant and for the plaintiff to take all steps to effect transfer of the 24 properties to the defendant.

ISSUES FOR DETERMINATION

The plaintiff's issues to be tried

[23] Whether Affin Bank, the chargee bank, had pegged RM75,000 being the redemption figure for each unit of the plaintiff's property as at 15 April 2004?

[24] Whether the defendant had paid RM4,343,780 to Affin Bank being the redemption sum?

[25] Whether Affin Bank had waived the redemption sum?

[26] Whether the plaintiff vide the SA had given the additional 24 apartment units to cover the said redemption amount? A

[27] Whether the defendant is obliged to return the 24 apartment units being held in trust to the plaintiff when the purpose had come to an end and/or when the chargee bank had not proceeded to impose and or charge any redemption for the 24 apartment units? B

[28] Whether the defendant now owes the outstanding maintenance charges, taxes, assessment, quit rent and insurance for the 24 apartment units before reassigning back to the plaintiff? C

The defendant's issues to be tried

[29] Whether on the true construction of the SA dated 15 April 2004 there is provision for a two stage process for settlement or separate scenarios where: D

(a) 34 properties are to be taken and received by the defendant in settlement of the plaintiff's debt in the amount of RM5,236,590 ('debt'); and E

(b) 24 properties are to be taken and received by the defendant as consideration for the payment of the redemption sum for the 58 properties in the amount of RM75,000 for each of the 58 properties in the aggregate amount of RM4,350,000 ('redemption sum'); F

Or

Whether, on a true construction of the SA there is a single obligation by the defendant to pay the redemption sum for the 58 properties calculated at RM75,000 for each of the 58 properties. G

[30] Whether on a true construction of the SA, and collaterally, there was established or any trusts created, whether express or implied in favour of the plaintiff in respect of the 24 properties, in circumstances where the SA has no express provision for the creation of any express trusts or purpose trusts as contended by the plaintiff. H

[31] Whether, the defendant's obligation to pay the redemption sum has been performed and discharged by the acts of third parties not privy to the SA by the contract dated 9 January 2007 and confirmed by a letter dated 15 January 2007, between Kemas Budi Sdn Bhd ('Kemas Budi'), which was in January 2007 a shareholder of the plaintiff, and representatives of the Kedah State Government, where it was agreed that: I

(a) Kemas Budi would transfer its 29.4% shares in the plaintiff to the State Government of Kedah or its nominees; and

(b) the 'relevant Kedah governmental authorities' undertake to settle all loans and liabilities of the plaintiff and to absolve all the liabilities of Kemas Budi and its associated companies in the group, particularly the liabilities of the defendant?

('share transfer contract').

[32] Whether, the full satisfaction and payment of the redemption sum which occurred through, under and by reason of, the performance by Kemas Budi and the 'relevant Kedah governmental authorities' of the share transfer contract has released the defendant of its obligation to pay the redemption sum and further constitutes performance of the defendant's obligations under the SA.

[33] Whether, if the share transfer contract constitutes performance of the defendant's obligations to pay the redemption sum under the SA:

(a) the 24 properties are subject to a bare trust in favour of the defendant;

(b) the plaintiff's continued refusal to deliver vacant possession of the 24 properties to the defendant is:

(i) a breach of contract; or

(ii) a breach of trust; or

(iii) an act of trespass?

Which entitled the defendant to the reliefs and remedies prayed for in the statement of defence and counterclaim.

[34] Whether the plaintiff's claim for recovery of the 24 properties on the basis of an alleged trust in favour of the plaintiff, is not premised on:

(a) the acts of fraud committed by the defendant or any fraudulent breach of trust in respect of the acquisition of the properties; and

(b) the fact that the defendant having possession and control of the 24 properties, is unenforceable and barred by the Limitation Act 1953.

[35] Whether the plaintiff's purported sale of the three properties identified as units A-4–2A, A–7-5B and A-6–90 ('three properties'), the subject of the settlement agreement are in fact a fraudulent breach of trust and/or a breach of contract, which consequently, the defendant is entitled to recovery from the plaintiff of the value of the three properties and/or other remedies and reliefs prayed for in the statement of defence and counterclaim.

[36] Whether from the plaintiff's admission of withholding possession to the 24 properties from the defendant, on a true construction of the settlement agreement, the defendant is liable to pay maintenance fees in respect of the 24 properties.

ANALYSIS OF EVIDENCE AND ISSUES ARISING

[37] Based on the material facts and the reliefs sought by the plaintiff, it basically seeks to recover the 24 properties in specie. As contended by the defendant, the issues for consideration and resolution at the trial revolve upon a narrow compass that turns largely upon whether:

(a) the true nature of the plaintiff's action and cause of action is based on a breach of contract or for breach of trust;

(b) on a true construction of the settlement agreement:

(i) the plaintiff has established the existence of an express trust or a purpose trust and whether the express trust or purpose trust had failed; and

(ii) in the event that no express trust or purpose trust had been created, whether the plaintiff has established the conditions giving rise to a constructive trust;

(c) on a true construction of the settlement agreement, there was an intention to pass beneficial interest and ownership in the 58 properties to the defendant so to give rise to the creation of a bare trust in respect of the 24 properties in favour of the defendant.

[38] Further, the defendant also contended that several secondary issues also arise for the court's determination as follows:

(a) whether the defendant's obligation under the settlement agreement had been performed through the agreement between Kemas Budi and government linked agencies of the Kedah State Government, whereby Kemas Budi had agreed to transfer its shares in the plaintiff in exchange for government linked agencies of the Kedah State Government assuming and paying of the redemption sums for the 58 properties, specifically in relation to the acts of the Kedah Overseas Training Network Sdn Bhd ('KOIRAN');

(b) whether the plaintiff's claim for recovery of the 24 properties in specie is barred by the Limitation Act 1953 if the plaintiff's cause of action:

(i) is based on a breach of contract; and

(ii) where the 24 properties remain in the possession and control of the

plaintiff and the plaintiff does not allege fraud on the part of the defendant;

(c) whether the three properties respectively sold by the plaintiff to Abdul Nasir bin Abdul Ghani, Leong Eng Keat/Leong Phek Sim Ramanaidu a/l Maree, are a fraudulent breach of trust.

[39] In the defendant's submission, the issues arising from its counter-claim revolve upon the following:

(a) whether the plaintiff's admitted retention of possession to the 24 properties and refusal to deliver possession of the 24 properties to the defendant are actionable breaches of trust, and/or trespass for which equitable compensation or damages, as the case may be, is recoverable by the defendant;

(b) whether the plaintiff's sale of the three properties gives rise to an actionable fraudulent breach of trust, so to entitle the defendant to the recovery of equitable compensation for the loss of the three properties; and

(c) whether, the defendant's counterclaim for recovery of equitable compensation and/or damages in respect of (a) and (b) is barred by the Limitation Act 1953.

[40] On the question of identifying the plaintiff's pleaded cause of action by reference to the relief sought, reference was made to the authorities below.

[41] In *Hock Hua Bank Bhd v Leong Yew Chin* [1987] 1 MLJ 230 at p 233, Syed Agil Barakhbah SCJ in identifying the *difference* between the true nature of relief and a cause of action said:

> Relief means a remedy sought by a plaintiff in an action. A cause of action is simply a factual situation the existence of which entitles a plaintiff to obtain from the Court a remedy against the defendant (see Diplock LJ in *Letang v Cooper* [1965] 1 QB 232 at pp 242–3. There must be a cause of action before a plaintiff can claim a relief in an action (see O 15 r 1 of the RHC 1980).

[42] In *Nasri v Mesah* [1971] 1 MLJ 32 at p 34, the Federal Court held:

A 'cause of action' is the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment (per Lord Esher MR in *Read v Brown* (1888) 22 QBD 128 at p 131). In *Reeves v Butcher* [1891] 2 QB 509 at p 511 Lindley LJ said:

> This expression, 'cause of action', has been repeatedly the subject of decision, and it has been held, particularly in *Hemp v Garland* LR 4 QB 509 at p 511, decided in

> 1843, that the cause of action arises at the time when the debt could first have been recovered by action. The right to bring an action may arise on various events; but it has always been held that the statute runs from the earliest time at which an action could be brought.

In *Board of Trade v Cayzer, Irvine & Co* [1927] AC 610 at p 617, Viscount Dunedin described 'cause of action' as that which makes action possible.

[43] It cannot be disputed that the plaintiff's cause of action is premised primarily on the fact that the plaintiff and the defendant had entered into the settlement agreement wherein it was, inter alia, agreed that 34 properties were to be in part settlement of the debt and that, the 24 properties were intended to be consideration for the redemption sum payable to the chargee bank.

[44] In respect of constructive trust, the law is that it would only be imposed by the court to satisfy the demands of justice. The defendant relied on the Court of Appeal case of *Tay Choo Foo @ Tay Chiew Foo v Tengku Mohd Saad @ Tengku Arifaad bin Tengku Mansur & Ors (all acting as administrators of the estate of Tunku Mansur bin Tunku Yaacob, deceased) and another appeal* [2009] 1 MLJ 289 (CA) where Mohd Ghazali JCA said, inter alia, this of a constructive trust:

> In *Hussey v Palmer* [1972] 3 All ER 744, as to the meaning of constructive trusts, Lord Denning MR said (at p 747):
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> > Although the plaintiff alleged that there was a resulting trust, I should have thought that the trust in this case, if there was one, was more in the nature of a constructive trust; but this is more a matter of words than anything else. The two run together. By whatever name it is described, it is a trust imposed by law whenever justice and good conscience require it. It is a liberal process, founded on large principles of equity, to be applied in cases where the defendant cannot conscientiously keep the property for himself alone, but ought to allow another to have the property or a share in it. The trust may arise at the outset when the property is acquired, or later on, as the circumstances may require. It is an equitable remedy by which the court can enable an aggrieved party to obtain restitution. It is comparable to the legal remedy of money had and received which, as Lord Mansfield said, is very beneficial and, therefore, much encouraged. Thus we have repeatedly held that, when one person contributes towards the purchase price of a house, the owner holds it on a constructive trust for him, proportionate to his contribution, even though there is no agreement between them, and no declaration of trust to be found, and no evidence of any intention to create a trust.

[45] Applying the principle to the instant facts, it is plain that the facts of this case do not fall within the scope of a constructive trust as described above. In

particular, the plaintiff has not demonstrated that justice and good conscience require that an inference be made of the existence of such a trust in favour of the plaintiff.

CONCLUSION

[46] To sum up, the court finds as follows on the plaintiff's claim and the defendant's counterclaim.

[47] Upon having considered the evidence adduced in its entirety, the pleadings and the submissions advanced on behalf of both parties, the court's conclusion on the core issues are as below.

[48] The dispute between the two contracting parties in this case under the settlement agreement entered into ('S/A') dated concerns primarily whether the said 24 apartment units ('the 24 units') assigned by the plaintiff ('P') to the defendant ('D') under the S/A are held by D in trust for P.

[49] It is P who are alleging the existence of a trust, a resulting or any other form of trust, in respect of the said 24 units and therefore is the party that bears the onus of proving the existence of the purported trust. From an evaluation of all the material evidence on this issue, it is the court's finding that P has failed to prove satisfactorily that the 24 units were assigned to D to be held in trust for P for the properties to be reverted to P should D fail to settle the redemption sum to the chargee bank. There is no provision or agreement to this effect in the S/A whose terms are clear and unambiguous. The court in construing the S/A has to read the words used literally to give effect to the same in the determination of the true intention of the parties and not to impute non-existent terms. Having construed the S/A as such, the court holds that the remedy for the failure of D to pay the redemption sum is not reversion or reassignment of the units to D.

[50] As to the circumstances under which a resulting trust and a constructive trust may be inferred, it would be useful to refer to the judgment of the Federal Court in *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751; [2010] 1 CLJ 381 where it was held, inter alia:

> The device of a resulting trust was invented by the Court of Chancery to give effect to the implied intention of the parties in relation to the acquisition and disposal of moveable or immoveable property. The primary function of the court in a case where a resulting trust is asserted or a gift is alleged arising from a disposition of property is to determine whether the initial disponor intended to make a gift of the property, movable or immovable, or whether he or she intended the property to be held by the disponee in trust for some other person or persons, including the disponor or the disponee or both. A court when called upon to decide whether a

resulting trust or a gift was intended in given circumstances should not begin by resorting to presumptions. It must meticulously examine the facts to objectively ascertain the true intention of the parties. It is only when there is absent any indication of what was intended by the parties that the court should resort to presumptions. *Westdeutsche Landesbank Girozentrale* v *Islington LBC (foll)*; *Heng Gek Kiau* v *Goh Koon Suan (foll)*; *Kyriakides v Pippas (foll)*; *Berry v British Transport Commission (foll)*. (paras 17, 18 & 19)

A constructive trust is imposed by law irrespective of the intention of the parties. It is imposed only in certain circumstances, such as where: (i) there is a specifically enforceable contract for the sale of property (moveable of immovable), the vendor holds the property on a constructive trust for the purchaser; and (ii) a gift made as a donatio mortis causa fails, the intended beneficiary of the gift holds it in trust for the donor. What equity does in those circumstances is to fasten upon the conscience of the holder of the property a trust in favour of another in respect of the whole or a part thereof. *Paragon Finance plc* v *DB Thakerar & Co (foll)*. *Wong Siew Choong v Anvest Corporation Sdn Bhd (refd)* (para 20)

[51] In proposing that the transfer of the 24 apartment units by the plaintiff cannot be construed as a gift the plaintiff contended that it is clear from the construction of cl 4 of the settlement agreement that the plaintiff is required to pay the difference in the event there is an increase in the redemption sum by Affin Bank.

[52] Further reference was made to *Takako Sakao* where it was pronounced:

In our judgment, the primary function of the court in a case where a resulting trust is asserted or a gift is alleged arising from a disposition of property is clear. It is to determine whether the initial disponor intended to make a gift of the property be it movable or immovable, or whether he or she intended it to be held by the disponee in trust for some other person or persons, including the disponor or the disponee or both. A court when called upon to decide whether a resulting trust or a gift was intended in given circumstances should not begin by resorting to presumptions. It must meticulously examine the facts to objectively ascertain the true intention of the parties. If the intention of the parties when objectively determined was that the particular property was to be held on a resulting trust then that is the conclusion the court should declare. However, if the intention was that the disponee of the property was to have it as a gift, there can then be no question of a resulting trust being implied. It is only when there is absent any indication of what was intended by the parties that the court should resort to presumptions. Were it otherwise, the court may be arriving at an incorrect conclusion based on a presumption when the evidence points in quite the opposite direction. As Devlin LJ (later Lord Devlin) said in *Berry v British Transport Commission* [1961] 3 All ER 65 at p 75:

> ... presumptions of law ought to be used only where their use is strictly necessary for the ends of justice. They are inherently undesirable ... because they prevent the court from ascertaining the truth, which should be the prime object of a judicial investigation, and because, if they are allowed to multiply to excess, the law will become divorced from reality and will live among fantasies of its own.

[53] On the contrary, the defendant took the position that they effected payment in the form of transfer of shares by a third party which was opposed to the contention of a gift. The plaintiff pointed out that there was no contemporary document from the receiver and manager ('R and M'), under whom the plaintiff was placed, indicating agreement to such an arrangement. Upon the appointment of the R and M no other party had control over the affairs of the plaintiff. Furthermore, that there was no contemporary documentation between parties to suggest that the plaintiff had assigned 24 apartment units as a gift to the defendant and also that the act of retaining the keys and the refusal to give vacant possession is also a clear indication that the transfer of 24 apartment units at no material time was a gift on the part of the plaintiff.

[54] Reference was also made to an authoritative text on this subject, *Equity and Trust in Malaysia* by Mohsin Hinguin and Wan Azlan Ahmad states that:

> [5.001] A resulting does not come into existence based on the actual intention of the parties, but is, on the other hand, founded on the existence of a state of affairs giving rise to perused intention. There are numerous classifications of resulting trust: perhaps the most authoritative recent judicial reference, and the one adopted for the purposes of the present work, is that of Lord Browne-Wilkinson in *Westdeusche Landesbank Girozentrale v Islington LBC* ...

(See also *Heng Grek Kian v Goh Koon Suan* [2007] 6 CLJ 626.)

[55] Similarly, as to whether a constructive trust arose in favour of the plaintiff, reliance was placed heavily on *Takako Sakao*, specifically to this passage from the judgment:

> A constructive trust is imposed by law irrespective of the intention of the parties. And it is imposed only in certain circumstances. Two examples readily available (apart from the facts of this case and those illustrations provided by Millet LJ in *Paragon Finance plc v DB Thakerar & Co*) are: (i) where there is a specifically enforceable contract for the sale of property (moveable of immovable), the vendor holds the property on a constructive trust for the purchaser: see *Wong Siew Choong Sdn Bhd v Anvest Corporation Sdn Bhd* [2002] 3 MLJ 143; [2002] 3 CLJ 409; and (ii) where a gift made as a donatio mortis causa fails, the intended beneficiary of the gift holds it in trust for the donor. As may be seen, the vendor in the first illustration and the purportedly dying donor or the beneficiary in the second did not create any trust. Nor did they intend to do so. What equity does in those circumstances is to fasten upon the conscience of the holder of the property a trust in favour of another in respect of the whole or a part thereof.

[56] In regard to this issue, the plaintiff contended that on the current facts when the plaintiff had settled with Affin Bank there was no longer a requirement for the defendant to redeem. As such the defendant is holding the 24 apartment units in trust for the plaintiff.

[57] Further, that the defendant's main witness (DW1) had admitted that the redemption sum was no longer required if the loan had been settled. A

[58] However, as contended by the defendant, from an objective construction of the settlement agreement, the intention of the parties as manifested by the language they have employed points to an intention to transfer and convey the 58 properties to the defendant without the creation of a trust, whether express or a purpose trust. B

[59] Likewise, from an evaluation of all the facts and evidence, undoubtedly no evidence has been led or adduced by the plaintiff to show from the surrounding circumstances that the plaintiff intended that the 24 properties were to be transferred to the defendant as the price for effecting the payment of the redemption sum and in default, that the 24 properties were to be returned to the plaintiff in specie. C D

[60] As there clearly are insufficient facts and evidence from which an inference of such an intention can be made, a resulting trust, which was the premise of the plaintiff's pleaded case cannot be said to have come to existence. E

[61] For these reasons, inter alia, based on the totality of the evidence, the relevant documents and undisputed facts, it is found that P has failed to prove its pleaded claim, premised on trust on a balance of probabilities, particularly as to the issue reassignment of the properties to P upon non-fulfillment of an essential condition by D under the S/A and that reassignment is a proper remedy under the S/A for the alleged beach by D. F

[62] Proceeding to D's counterclaim ('C/C'), the onus to adduce evidence in support is on the defendant to prove its entitlement to the particulars pleaded and reliefs claimed. G

[63] In respect of the C/C in para 19.5 of the defence and the C/C for prayers (a), (i), (iii) and (b), the plaintiff has raised the defence of limitation. H

[64] On the claim for the three trust properties, the plaintiff contended that the claim if any is barred by limitation pursuant to the Limitation Act 1953 ('the LA'). It is on the basis that, as admitted by DW1 himself, the defendant had received payment on 13 February 2007 being full and final payment but it was not agreeable. Hence, that the cause of action accrued on 13 February 2007 after which the limitation period started to run. As such, this claim, being premised on contract, was statute-barred as it was commenced only in 2017 which was well after the limitation period had lapsed. I

[65] Section 6 of the LA provides that:

> 6 Limitation of actions of contract and tort and certain other actions
>
> (1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say —
>
> (a) action founded on a contract or on tort;
>
> (b) actions to enforce a recognizance;
>
> (c) actions to enforce an award;
>
> (d) actions to recover any sum recoverable by virtue of any written law other than a penalty or forfeiture or of a sum by way of penalty or forfeiture.

[66] In regard to the claim for loss of furnishing materials, DW1 again admitted that the purchase of the same was done in 2010 whereas the counterclaim was only filed on 3 January 2018.

[67] In support of its contention, the plaintiff rightly relied on the leading Federal Court case of *Nasri v Mesah* [1971] 1 MLJ 32; [1970] LNS 85 where it was held that:

> A 'cause of action' is the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment (per Lord Esher MR in *Read v Brown* (1888) 22 QBD 128, 131). In *Reeves v Butcher* [1891] 2 QB 509, 511 Lindley LJ said:
>
> > This expression, 'cause of action', has been repeatedly the subject of decision, and it has been held, particularly in *Hemp v Garland* LR 4 QB 519, decided in 1843, that the cause of action arises at the time when the debt could first have been recovered by action. The right to bring an action may arise on various events; but it has always been held that the statute runs from the earliest time at which an action could be brought.

[68] I agree with the proposition that, under the circumstances, the defendant's cause of action for these reliefs accrued in the year 2010 and as such, it is caught by s 6 of the Limitation Act 1953.

[69] Having considered the material facts and the principles applicable to limitation, D has not proved that these claims have been made within the statutory limitation period and are therefore, statute barred. As regards prayer (a)(ii), I find that D has proved its entitlement to the loss of income as pleaded for a period of six years preceding the commencement filing of this action at the monthly rental rate stated which is supported by the evidence of DW1.

[70] The C/C is, therefore, allowed and judgment entered as per para 19.5(a) para (ii) for the above period of six years, para 19.6 with interest at 4% until the date of judgment and 5%pa on the judgment sum and para 19.7. And also para 19.1, 19.2 and 19.3.

[71] The plaintiff's claim is dismissed with costs. Parties at liberty to apply for consequential reliefs.

[72] Costs assessed at RM30,000 subject to allocatur.

Plaintiff's claim dismissed; defendant's counterclaim allowed in part with costs of RM30,000.

Reported by Dzulqarnain Ab Fatar